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[illegible] MCORP FINANCIAL INC. and MCORP MANAGEMENT,
Respondents.

MCORP, *et al.*,
Petitioners,
v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF MCORP, *et al.*

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QUESTIONS PRESENTED

1. Whether the exhaustion of administrative remedies provision of the Financial Institutions Supervisory Act of 1966, 12 U.S.C. § 1818(i), divests the district court of jurisdiction to enjoin administrative enforcement proceedings by the Federal Reserve Board affecting the assets of a bank holding company which is a chapter 11 debtor in possession.

2. Whether the Federal Reserve Board has statutory authority to promulgate and enforce its "source-of-strength" assessment policy to compel a bank holding company to transfer all its available assets into its subsidiary banks.

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JOINT BRIEF OF MCORP, *et al.*

STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Bankruptcy Reform Act of 1978, As Amended ("Bankruptcy Code") (11 U.S.C. §§ 105, 362; 28 U.S.C. §§ 1334(b), 1334(d)), the Bank Holding Company Act of 1956 ("BHC Act") (12 U.S.C. § 1841 *et seq.*), the International Lending Supervision Act of 1983 ("ILSA") (12 U.S.C. § 3901 *et seq.*), and the Financial Institutions Supervisory Act of 1966 ("FISA") (12 U.S.C. § 1818), as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), are set forth in an Appendix to the Board's Brief. Section 2106 of Title 28, and pertinent sections of amendments to the National Bank Act adopted in 1933, 1935, 1953 and 1959, are reprinted in an Appendix hereto.

STATEMENT OF THE CASE

This case arises out of administrative enforcement proceedings brought by the Board of Governors of the Federal Reserve System (the "Board") to determine prepetition claims against and compel payments of money by MCorp,[1] a bank holding company operating as a debtor in possession under chapter 11 of the Bankruptcy Code.

In the spring of 1988, MCorp commenced discussions with, among others, the Federal Deposit Insurance Corporation (the "FDIC"), the Comptroller of the Currency (the "Comptroller") and the Board (collectively, the "Regulators") in an effort to develop a comprehensive recapitalization and restructuring plan for MCorp and its 25 MBank national bank subsidiaries (the "MBanks"). Towards this end, on October 7, 1988, MCorp submitted a formal proposal to the FDIC which contemplated a

[1] MCorp is the parent company of both MCorp Financial Inc. and MCorp Management, both of which also are operating as debtors in possession under chapter 11. MCorp, MCorp Financial Inc. and MCorp Management have only wholly owned subsidiaries. All three companies will be referred to collectively as "MCorp."

global recapitalization and restructuring of MCorp and its subsidiaries, involving the infusion of substantial new private capital and FDIC open-bank assistance for the MBanks.

Despite MCorp's commitment to dedicate all its liquid assets to such a restructuring, the Regulators insisted that MCorp first infuse all its available assets into the MBanks as a condition precedent to opening negotiations for FDIC open-bank assistance. Such an infusion, however, unaccompanied by open-bank assistance, would have been insufficient to avert the failure of a substantial number of the weakest MBanks, and consequently it would have inured to the sole benefit of the FDIC. Several MCorp creditors both threatened and initiated legal action against MCorp and its board of directors to enjoin such a use of MCorp's assets because it would have been "obviously improper for the Board [of Directors] to allow MCorp to risk its own assets, or those of its nonbank or healthy bank subsidiaries, on stopgap measures that will only prolong the deterioration of the troubled bank subsidiaries." J.A. 166. When MCorp refused the Regulators' demands, the Regulators embarked on a carefully orchestrated scheme to strip MCorp of its assets and to seize the MBanks.[2]

1. The Source-of-Strength Proceeding and the Temporary Cease-and-Desist Orders

On October 19, 1988, the Board commenced administrative enforcement proceedings against MCorp through the issuance of a "notice of charges" which, as amended on October 26, 1988, alleged that MCorp was engaging in "unsafe and unsound banking practices" and violations of law and regulation by refusing immediately to contribute its available assets to the troubled MBanks. J.A. 56-64, 71-83. These administrative proceedings were based upon the Board's "source-of-strength" assessment policy, pursuant to which the Board claims authority to compel a bank holding company to contribute all its available funds to a subsidiary bank without regard to the bank's financial condition or viability. The Board also issued three temporary cease-and-desist orders, which, under law, were effective immediately. J.A. 65-67, 68-70, 84-86.[3] The first two temporary orders were, according to the Board, "designed to preserve [the Board's] practical ability to enforce the source-of-strength requirements" by broadly restricting any transactions that would have resulted in the "dissipation" of MCorp's assets. Board Br. (5th Cir. Aug. 14, 1989) 6; J.A. 66, 69. The third temporary cease-and-desist order demanded that MCorp immediately "take such actions as are necessary to use all of its assets to provide capital support to its Subsidiary Banks." J.A. 85.

[2] *See MCorp* v. *Clarke*, 755 F. Supp. 1402, 1404-05, 1414-16 (S.D. Tex. 1991).

MCorp timely challenged the Board's three temporary orders in the United States District Court for the Northern District of Texas pursuant to 12 U.S.C. § 1818(c)(2).[4] On November 7, 1988. the Board agreed temporarily to stay its source-of-strength proceedings and the third temporary cease-and-desist order—but not the first and second temporary orders—while the FDIC considered MCorp's formal recapitalization proposal. J.A. 184. Subsequently, the Northern District stayed MCorp's challenge for the duration of the preliminary injunction issued in this proceeding. *See* J.A. 50, 178-79.

2. The Seizure of the MBanks and the Filing of the Chapter 11 Cases

On March 28, 1989, two days after learning from MCorp of the filing by three small MCorp creditors of an

[3] 12 U.S.C. § 1818(c) provides that a temporary cease-and-desist order shall become effective "upon service."

[4] MCorp advised the Board that it would not downstream its assets into the undercapitalized MBanks "because such action would have constituted a waste of MCorp's assets, fraudulent conveyances of those assets, and a violation of Delaware law subjecting MCorp and its officers and directors to personal liability," unless such a downstreaming of assets were accomplished as part of a global restructuring of the MCorp enterprise. J.A. 200.

involuntary petition against MCorp for relief under chapter 7 of the Bankruptcy Code, the FDIC rejected MCorp's proposed global recapitalization. As described by the Board, "[t]he FDIC's decision set in motion a chain of events culminating in the insolvency" and seizure by the Comptroller and the FDIC of 20 of the 25 MBanks (the "Closed MBanks").[5] Board Br. (5th Cir. Aug. 14, 1989) 7-8.

On March 31, 1989, MCorp sought protection under chapter 11 of the Bankruptcy Code by converting the involuntary chapter 7 petition to a voluntary chapter 11 reorganization. MCorp continues to operate its remaining business as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Section 23A Proceeding

Less than ten days after the involuntary bankruptcy petition was filed against MCorp and two days after the Comptroller seized the Closed MBanks, the Board issued yet a third notice of charges alleging that MCorp had violated section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, "beginning in 1987," by failing to make certain contractually required payments allegedly due to MBank Houston and MBank Dallas, two of the Closed MBanks.[6] Board Mem. of Law (S.D. Tex. May 25, 1989) at 23 n.13; *see also* J.A. 90.

The Board's section 23A proceeding seeks to compel MCorp to account for and pay to the FDIC, as receiver

[5] In two related cases, the United States District Court for the Northern District of Texas has ruled that the FDIC and the Comptroller violated the National Bank Act in closing 12 of these MBanks that were solvent when seized. *MBank New Braunfels* v. *FDIC*, 721 F. Supp. 120 (N.D. Tex. 1989); *MCorp* v. *Clarke*, 755 F. Supp. 1402 (N.D. Tex. 1991).

[6] The Board alleged that these alleged prepetition monetary obligations violated section 23A as unsecured extensions of credit. J.A. 90. However, the transaction allegedly giving rise to MCorp's monetary obligation to the Closed MBanks was itself reviewed by the Board in 1986 in advance of its implementation and not criticized. J.A. 207.

of MBank Houston and MBank Dallas, disputed *prepetition* claims arising out of transactions that occurred more than two years prior to the seizure of the Closed MBanks and the filing of MCorp's bankruptcy cases. The FDIC, as receiver for the Closed MBanks, sought to recover for the *same* alleged unsecured credit extensions that are the subject of the Board's section 23A proceeding by filing a proof of claim in MCorp's chapter 11 case. Although the district court recently dismissed as time-barred that portion of the FDIC's claim that arose prior to March 28, 1987, the remainder of the FDIC's claim will be heard and determined by the district court in accordance with section 502 of the Bankruptcy Code.

4. Reactivation of the Source-of-Strength Proceeding

On May 24, 1989, while MCorp was a chapter 11 debtor in possession subject to the oversight and protection of the bankruptcy court and Bankruptcy Code, the Board reactivated the October 1988 source-of-strength proceedings by issuing a "Second Amended Notice of Charges" seeking the issuance of a cease-and-desist order against MCorp "including a requirement that MCorp *immediately* make . . . additional investments in its Subsidiary Banks." J.A. 193 (emphasis added). The Second Amended Notice also reaffirmed the continuing effectiveness of the three outstanding temporary cease-and-desist orders, J.A. 194, which included the requirement that MCorp "use all of its assets to provide capital support to its Subsidiary Banks," J.A. 85. Thus, after MCorp's chapter 11 filing, the Board sought to compel MCorp to transfer its assets to its subsidiary MBanks, thereby attempting to deplete the assets available for distribution to MCorp's creditors.

5. Proceedings Below

On June 9, 1989, the district court, sitting in bankruptcy, issued a preliminary injunction against the Board's pending administrative enforcement proceedings and the three outstanding and effective temporary cease-and-desist orders, and further enjoined the Board from any other effort to use:

> its authority over bank holding companies or banks to attempt to effect, directly or indirectly, a reorganization of the MCorp group or its components or to interfere, except through participation in the bankruptcy proceedings, with the restructuring being developed in the bankruptcy proceeding.

J.A. 54. The district court specified that the preliminary injunction left completely unaffected the Board's "general execution, supervisory, and examination duties of the operations of MCorp and its bank subsidiaries." *Id.*

On May 15, 1990, the United States Court of Appeals for the Fifth Circuit vacated the injunction with respect to proceedings on the Board's section 23A charges, ruling that the bankruptcy court could not interfere with the Board's jurisdiction to prosecute its section 23A charges against MCorp. The court of appeals also remanded the case to the district court with instructions to enjoin proceedings on the Board's source-of-strength charges because those "proceedings exceed[ed] its statutory authority." J.A. 36.

SUMMARY OF THE ARGUMENT

Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), provides that the filing of a petition under the Bankruptcy Code operates as an automatic stay against, *inter alia*, any "judicial, *administrative* or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case . . . or to recover a claim against the debtor that arose before the commencement of the case," "any act to . . . exercise control over property of the estate" and "any act to collect, assess, or recover a [prepetition] claim against the debtor." (Emphasis added.) The stay takes effect automatically as a *statutory* matter. Therefore, no judicial action is necessary to invoke it. Both 12 U.S.C. § 1818(i), on which the Board relies to escape the all-encompassing jurisdiction of the bankruptcy court, and the legislative history of that section, are devoid of any language or indication of a congressional intent to override an automatic *statutory* stay such as the one provided by section 362(a). The language in section 1818(i), relied on by the Board, addresses only *court* review of an administrative cease-and-desist order; it does not affect the operation of a statutorily mandated automatic stay.

The Board's proceedings to compel payments of money by MCorp and to assert control over MCorp's assets are not within the "governmental action" exception to the automatic stay of section 362(b)(4) of the Bankruptcy Code. The plain language of that exception makes it applicable *only* to an automatic stay arising under section 362(a)(1). That exception is inapplicable to stays arising under sections 362(a)(3) and (6), which are at issue here. Those provisions stay "any act to obtain possession of property of the [debtor's] estate . . . or to exercise control over [such] property," or to "assess, or recover a claim . . . that arose before the [bankruptcy case]."

Even as to governmental proceedings that are not automatically stayed, the Bankruptcy Code expressly establishes a procedure designed to balance the legitimate regulatory functions of governmental units with the fundamental purposes of the Bankruptcy Code. Specifically, section 105(a) of the Bankruptcy Code authorizes the bankruptcy courts to enjoin administrative enforcement proceedings excepted from the automatic stay when the proceedings threaten the assets or the reorganization of the debtor or interfere with administration of the estate by the court. Although the issuance of a section 105(a) injunction, unlike a section 362 automatic stay, requires judicial action, such action is not precluded by 12 U.S.C. § 1818(i). The Board concedes that section 1818(i) is not a "jurisdictional bar," but merely "calls for the exhaustion of administrative remedies." Board Br. 32, 35. Such an exhaustion requirement does not override the broad congressional grant of bankruptcy jurisdiction to the district courts.

Title 28, a vital part of the bankruptcy scheme, vests the district court, sitting in bankruptcy, with *exclu-*

sive jurisdiction over MCorp's property. 28 U.S.C. § 1334(d). Further, title 28 vests the district court, sitting in bankruptcy, with broad jurisdiction over all matters and proceedings relating to a bankruptcy case in order to ensure effective administration of a bankruptcy case and to prevent piecemeal litigation in multiple forums. 28 U.S.C. § 1334(b). Significantly, section 1334(b) expressly provides that the jurisdiction of another tribunal—even one with statutorily exclusive jurisdiction—does not oust the district court from exercising jurisdiction over "*all* civil proceedings" relating to a debtor's bankruptcy case.

This overriding grant of original concurrent jurisdiction invested the district court with jurisdiction to enter a preliminary injunction against the Board's administrative enforcement actions and its temporary cease-and-desist orders, "[n]otwithstanding" any allocation by section 1818 of "exclusive jurisdiction" to review the Board's administrative enforcement proceedings. There is no basis for the Board's assertion that the section 1334(b) override of jurisdictional exclusivity statutes is inapplicable to adjudicatory proceedings pending before Article I tribunals. In addition, the district court had jurisdiction under section 1334(b) to enjoin the temporary cease-and-desist orders by virtue of its concurrent jurisdiction over the pending "civil proceedings" relating to MCorp's challenge in the Northern District of Texas to the Board's temporary cease-and-desist orders pursuant to 12 U.S.C. § 1818(c)(2). *See* J.A. 177.

Jurisdiction to enjoin the Board's source-of-strength proceedings also exists on the ground that the Board has no statutory authority to levy source-of-strength assessments on bank holding companies. Neither the BHC Act, FISA, nor ILSA furnishes any basis for the purported authority of the Board to levy monetary assessments against bank holding companies. The court of appeals correctly ruled that the source-of-strength assessment policy—pursuant to which the Board claims authority to compel a bank holding company to contribute all

its available assets to a subsidiary bank—clearly exceeds the Board's statutory authority. The Board concedes that no statute expressly grants such authority. Notwithstanding this conclusive concession, the Board purports to find this authority to levy unlimited monetary assessments against bank holding companies in an internal policy derived from the Board's "construction of [three] interrelated statutory schemes." Board Pet. 14.

On many occasions over the past 58 years, Congress has considered the very authority the Board asserts here and, in each instance, refused to grant the Board the authority to compel bank holding companies to pour their funds into subsidiary banks. Indeed, in the Banking Acts of 1933 and 1935, which established the initial framework for the regulation of bank holding companies, Congress expressly prohibited bank regulators from imposing mandatory assessments on shareholders of national banks. More recently, the issue of shareholder assessment powers was again before Congress in 1987, 1988, 1989 and 1990, and is now before the current session of Congress in several pending bills. To date, however, Congress has rejected all efforts to invest the Board with shareholder assessment powers.

Indeed, both the economic wisdom and the legality of the Board's purported authority have been challenged by the FDIC, the government agency responsible for administering the deposit insurance funds. Instead, the FDIC sought and obtained for itself the statutory power to assess affiliated federally insured *banks*—but *not* bank holding companies or their nonbank subsidiaries—for the FDIC's losses in closing affiliated banks. The Board's policy arguments underlying its disagreement with the FDIC concerning the desirability of a source-of-strength assessment power, Board Br. 41, properly should be addressed, as they have been in the past, to Congress.

ARGUMENT

I. PROSECUTION OF THE BOARD'S ADMINISTRATIVE PROCEEDINGS WOULD VIOLATE THE AUTOMATIC STAY OF THE BANKRUPTCY CODE

A. The Automatic Stay Applies to All Nonexcepted Administrative Actions

Section 362(a) of the Bankruptcy Code provides that the filing of a petition under the Bankruptcy Code operates as an *automatic* stay against virtually any action, including any judicial, administrative or other proceeding, that interferes with the district court's jurisdiction over and administration of the debtor's bankruptcy case. In pertinent part, section 362(a) provides that the filing of a bankruptcy petition operates as a stay, applicable to all entities,[7] of—

> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [the Bankruptcy Code], or to recover a claim against the debtor that arose before the commencement of the case under [the Bankruptcy Code];
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; [and]
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [the Bankruptcy Code.]

11 U.S.C. § 362(a).

The automatic stay is one of the fundamental protections of the Bankruptcy Code, designed to benefit creditors and other parties in interest—including governmental agencies—as well as the debtor. As explained in the legislative history accompanying the Bankruptcy Code:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977) (the "House Report"); S. Rep. No. 989, 95th Cong., 2d Sess. 49, 54-55 (1978) (the "Senate Report"). Thus, to prevent dismemberment of the estate and to ensure its orderly distribution, "[t]he scope of [the automatic stay] is broad" and applies to all proceedings, "including arbitration, license revocation, administrative, and judicial proceedings." House Report at 340. As this Court observed in *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494, 504 (1986), "in enacting § 362 in 1978, Congress significantly broadened the scope of the automatic stay." In fact, the scope of the stay is so broad that, as this Court further observed, "it was necessary for Congress to limit this new power expressly" in those circumstances where it intended to allow the government to commence or continue judicial or administrative proceedings. *Id.* at 504.

The court of appeals, however, brushed aside the automatic stay—without even considering whether the Board's

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[7] The term "entity" under the Bankruptcy Code includes departments, agencies or instrumentalities of the United States. 11 U.S.C. §§ 101(15) & (27).

administrative proceedings were authorized pursuant to any statutory exception—on the unprecedented ground that 12 U.S.C. § 1818(i) supersedes the automatic statutory stay. Whatever the effect of section 1818(i) on judicial action respecting Board proceedings, a stay pursuant to section 362(a) is self-executing and automatic and does not require judicial action and, therefore, does not implicate section 1818(i).

Moreover, as the Board acknowledges, section 1818(i) does not provide a "jurisdictional bar"; it merely "calls for the exhaustion of administrative remedies." Board Br. 32, 35. Therefore, even under the Board's reading of section 1818(i), the Bankruptcy Code's automatic stay inevitably will take effect at some point in time—*i.e.*, either upon the Board's entry of an immediately effective and appealable temporary cease-and-desist order (which, in fact, has already occurred here) or at the conclusion of the administrative proceedings and the entry of a final Board order. Such an absurd off-again-on-again application of the section 362(a) stay is contrary to the strong congressional policy underlying that fundamental protective provision. Neither law nor logic supports the court of appeals' conclusion that a statutory provision establishing the procedure for judicial review of certain administrative enforcement proceedings overrides the automatic bankruptcy stay that applies—without any court action—to all administrative and judicial proceedings except those statutorily excepted.[8]

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[8] The court of appeals' reliance on decisions holding "that the automatic stay provisions of the Bankruptcy Code . . . do not supersede the anti-injunction provision of the Norris-La Guardia Act," J.A. 21, is misplaced because, unlike section 1818(i), the Norris-La Guardia Act effects a broad, overriding congressional policy to withdraw from *all* federal courts *all* jurisdiction to issue injunctions in labor disputes. *See Order of R.R. Telegraphers* v. *Chicago & Northwestern Ry.*, 362 U.S. 330, 335-36 (1960). Further, the Norris-La Guardia Act anti-injunction provision was intended to protect the substantive rights of private parties and, indeed, none of the Board's cited cases even involved administrative agency action.

B. The Governmental Action Exception Does Not Apply to Acts To Obtain Possession of or Exercise Control Over a Debtor's Property or To Collect or Assess a Claim

To avoid the operation of the automatic stay, the Board relies on the narrow exception to the automatic stay for certain actions by governmental units in furtherance of their "police or regulatory power."[9] Specifically, section 362(b)(4) of the Bankruptcy Code provides that the filing of a bankruptcy case does not operate as an automatic stay:

> *under subsection (a)(1)* of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(b)(4) (emphasis added). The governmental action exception to the automatic stay was "intended to be given a *narrow construction* in order to permit governmental units to pursue actions to protect the public health and safety."[10]

As is plain on its face, this exception applies *only* to a stay under section 362(a)(1) of the Bankruptcy Code. *No* exception applies to actions stayed under section 362(a)(3) or (6), and courts consistently have held that the "governmental action" exception to the automatic

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[9] In section 362(b), Congress also enumerated several specific exceptions to the automatic stay for certain actions by administrative agencies. Significantly, none of those specific exceptions applies to the Board's administrative proceedings.

[10] 124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) (statement of Senator DeConcini), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6505, 6513 (emphasis added); 124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6436, 6444-45 (emphasis supplied). Contrary to the Board's assertion that courts have consistently given the governmental action exception a broad interpretation (Board Br. 23-24), consistent with congressional intent, courts have limited the excepted actions to those "affecting health, welfare, morals and safety."

stay does not apply when the governmental unit is attempting to obtain or control property of the debtor's estate.[11] As this Court stated in *Ohio* v. *Kovacs*, "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but the enforcement of such a judgment *by seeking money from the bankrupt . . . is another matter*." 469 U.S. 274, 283-84 n.11 (1985) (emphasis added).[12]

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[11] *See In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 555-56 (7th Cir. 1984); *Missouri* v. *United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *see also SEC* v. *First Financial Group*, 645 F.2d 429, 437 (5th Cir. 1981) ("Significantly, there is no exemption from the automatic stay affecting an act to obtain possession of property of the estate or of property from the estate (§ 362(a)(3)).").

In circumstances similar to those here, a bankruptcy court recently held that section 362(a)(3) stayed a temporary cease-and-desist order and administrative cease-and-desist proceedings pursuant to which the Office of Thrift Supervision ("OTS") "attempt[ed] to satisfy its monetary claim from assets of the estate" of a savings and loan holding company operating under chapter 11 of the Bankruptcy Code. *Firstcorp, Inc.* v. *OTS*, 122 Bankr. 484, 490 (Bankr. E.D.N.C. 1990). The court held:

> The provisions of the temporary cease and desist order which direct Firstcorp to cancel the capital note, to transfer the stock of First Federal of Durham to First Federal of Raleigh, and to fulfill First Federal of Raleigh's capital requirements involve the transfer of assets of the estate and are therefore stayed by § 362(a)(3) and may not be enforced by OTS against Firstcorp or against Firstcorp's officers and employees.

Id.

[12] That the governmental action exception is inapplicable to the Board's self-enforcing cease-and-desist orders (*see infra* pp. 21-22) compelling the transfer of assets by MCorp is further confirmed by section 362(b)(5), which prohibits a governmental unit from enforcing a money judgment. As the Third Circuit ruled in *Brock* v. *Morysville Body Works, Inc.*, 829 F.2d 383, 389 (3d Cir. 1987), "although the stay does not operate against actions or proceedings by governmental units 'attempting to fix damages for violation of . . . a [health and safety] law,' *id.* at 343, 1978 U.S. Code Cong. & Admin. News at 6299; *see also* S. Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787,

The Board's administrative proceedings and temporary cease-and-desist orders fall under sections 362(a)(3) and (6) of the Bankruptcy Code, which stay actions to obtain possession of or exercise control over a debtor's property or to assess or recover a claim. The very purpose of the source-of-strength proceedings and temporary orders against MCorp is to compel the transfer of assets of MCorp's estate. The Board alleges that MCorp is engaging in unsafe and unsound banking practices and violations of law that MCorp can cure only by immediately contributing property from the bankruptcy estate to its subsidiary MBanks and to the FDIC as receiver for the Closed MBanks. J.A. 84-85, 192. *Cf. Ohio* v. *Kovacs*, 469 U.S. 274, 281 (1985) ("There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money."). The Board suggests that its notices of charges seek only to determine *whether* MCorp's refusal to immediately transfer assets to its subsidiary banks constitutes an unsafe banking practice and a violation of law, Board Br. 28 and that the notices do not seek "control over the property of MCorp's estate," Board Br. 13. To the contrary, the Board already has made the determination that "failure to provide assistance to a subsidiary bank . . . *will* be viewed as an unsafe and unsound banking practice and a violation of Regulation Y," J.A. 192 (emphasis added), *see also* J.A. 78-79, and the Board is seeking control over MCorp's assets by compelling a transfer of them. Such an action is plainly at odds with section 362(a)(3).[13]

5838, it does prevent a governmental unit from enforcing a money judgment."

[13] *See Firstcorp, Inc.*, 122 Bankr. at 490 ("The administrative proceeding initiated by the Notice charges Firstcorp with unsafe and unsound practices, but essentially the complaint is that Firstcorp did not infuse capital to maintain First Federal of Raleigh's minimum capital requirement. Firstcorp may only meet that obligation by expending assets of the estate and, as previously discussed, OTS's attempts to satisfy its monetary claim from assets of the estate are stayed by § 362(a)(3).").

Similarly, as the Board concedes, the section 23A proceeding seeks to compel the Debtors to pay an alleged prepetition obligation to the FDIC, as receiver for MBank Houston and MBank Dallas. *See* Board Br. (5th Cir. Aug. 14, 1989) 31-32. The alleged violation of section 23A arises from MCorp's alleged failure to make those payments. Thus, that proceeding amounts to little more than a commercial dispute between MCorp and the FDIC concerning prepetition transactions involving two of the Closed MBanks.[14]

The Board's temporary cease-and-desist orders and administrative proceedings, by "seeking money from the bankrupt" [15] and to assess and collect a prepetition claim,[16] fall well outside the scope of the "narrow" governmental action exception of section 362(b)(4). Thus, the automatic stay is applicable to the Board's temporary cease-and-desist orders and administrative enforcement

[14] In the 23A proceeding, the Board would be acting in a quasi-judicial role and seeking to recover funds allegedly owed to the Closed MBanks for and on behalf of the FDIC, which, under these circumstances, is no different from any other creditor asserting a claim against MCorp. In this regard, the Board's administrative function is indistinguishable from that of the administrative agency in *In re Dan Hixson Chevrolet Co.*, 12 Bankr. 917 (Bankr. N.D. Tex. 1981). In that case, the Texas Motor Vehicle Commission sought to determine a dispute between an automobile manufacturer and the debtor concerning the debtor's automobile dealership franchise in an administrative proceeding. The court concluded that "where the administrative agency is acting in a quasi-judicial capacity seeking to adjudicate private rights rather than effectuate public policy as defined by regulatory law the (b)(4) exception is "inapplicable." *Id.* at 921. As in *Dan Hixson*, because the Board's administrative actions seek to affect the debtor-creditor relationship between MCorp and the FDIC, as receiver for the Closed MBanks, MCorp is entitled to the protection afforded by the automatic stay.

[15] *Ohio* v. *Kovacs*, 469 U.S. at 283 n.11.

[16] *See Firstcorp, Inc.*, 122 Bankr. at 491 (administrative cease-and-desist proceeding against savings and loan holding company operating under chapter 11 "is essentially an action to collect a monetary claim . . . and is stayed in its entirety by § 362(a)(3)").

proceedings; and because the automatic stay is self-effectuating and does not require judicial intervention, 12 U.S.C. § 1818(i) is simply inapplicable in these circumstances.

II. THE DISTRICT COURT HAS JURISDICTION UNDER SECTION 1334 TO ENJOIN THE BOARD'S ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE

As an alternative to its holding that the Board's administrative proceedings are subject to the automatic stay, the district court concluded that the preservation of MCorp's opportunity to reorganize necessitated the issuance of an injunction under section 105(a) of the Bankruptcy Code. J.A. 48-49. Section 105(a) provides that bankruptcy courts may issue any order "that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). Under section 105(a), courts routinely have enjoined governmental administrative actions that threatened the assets of the debtor's estate or impaired the debtor's ability to reorganize, even though those proceedings might have been excepted from the automatic stay.[17] Indeed, in enacting the Bankruptcy Code, Congress *specifically* contemplated that courts may enjoin actions that are excepted from the automatic stay:

> Subsection (b) lists seven exceptions to the automatic stay. *The effect of an exception is not to make the action immune from injunction.*
>
> * * * *
>
> *By excepting an act or action from the automatic stay, the bill simply requires that the trustee move*

[17] *See, e.g., Missouri* v. *United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981); *In re Shippers Interstate Serv., Inc.*, 618 F.2d 9, 13 (7th Cir. 1980); *see also SEC* v. *First Fin. Group*, 645 F.2d 429, 440 (5th Cir. 1981) ("To the extent that the exercise of [another court's concurrent] jurisdiction threatens the assets of the debtor's estate, the bankruptcy court may issue a stay of those proceedings.").

the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, *the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.*

Senate Report at 51 (emphasis added).[18]

In light of this unmistakable congressional intent, the use of section 105(a) to enjoin the Board's administrative proceedings is hardly the exercise of "a roving commission to do equity." Board Br. 25. It is clear that—even if the governmental action exception to the automatic stay were applicable here, which it is not—it is the district court and not the Board that should resolve any jurisdictional conflict raised by MCorp's chapter 11 filings and the Board's administrative proceedings. In claiming for itself the authority to determine which administrative actions may be brought without regard to the jurisdiction of the bankruptcy court, the Board is attempting to usurp the congressionally mandated function of the district court to resolve the potentially competing interests of debtors and the Board. The resolution of such issues by the district court, which is invested with broad jurisdiction over all matters related to the bankruptcy case, serves an important public purpose in that administrative agencies, such as the Board, may have parochial interests in conflict with those of other parties in interest in the bankruptcy case.

The interpretation of section 1818(i) urged by the Board would unnecessarily bring the Bankruptcy Code and the banking laws into direct and irreconcilable conflict. This interpretation would effectively exempt from the Bankruptcy Code a whole range of administrative proceedings despite Congress' clear intent to empower bankruptcy courts to enjoin administrative proceedings by vesting them with the necessary jurisdiction. Congress has determined that any potential conflicts between the bankruptcy laws and a regulatory scheme are to be reconciled by the bankruptcy court on the case-by-case basis contemplated in sections 105 and 362 of the Bankruptcy Code.

[18] *In re Wedgewood Realty Group, Ltd.*, 878 F.2d 693, 701 (3d Cir. 1989) ("Congress clearly envisioned that section 105(a) would be available to issue an injunction on a case-by-case basis in situations expressly excepted from the automatic stay . . . .").

A. The Exclusive Jurisdiction of the District Court Over MCorp's Property Divested the Board of Authority To Bring Administrative Enforcement Proceedings Seeking Control Over MCorp's Assets

In 28 U.S.C. § 1334, Congress evinced a clear intent that matters committed by another act of Congress to the *exclusive jurisdiction* of another tribunal may be heard by the bankruptcy courts if they entail control over the debtor's assets or affect the administration of the bankruptcy estate. *A fortiori*, the broad grant of bankruptcy jurisdiction to the district courts is not overridden by an exhaustion of remedies provision such as section 1818(i). *See* Board Br. 32, 35. Section 1334 grants the district court, sitting as a bankruptcy court, *exclusive* jurisdiction "of all of the property, wherever located, of the debtor as of the commencement of [the] case, and of property of the estate." 28 U.S.C. § 1334(d). As this Court explained in a case decided under the former Bankruptcy Act, the "jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of creditors." *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739 (1931). In furtherance of these objectives, the Court held that "[w]hen [the bankruptcy court's exclusive] jurisdiction has attached the court's possession cannot be affected by actions brought in other courts." *Id.* at 737 (citations omitted). As the Court noted:

> This is but an application of the well recognized rule that when a court of competent jurisdiction

> takes possession of property through its officers, *this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession.*

Id. at 737-38. (Emphasis added.) Consistent with *Isaacs*, courts have held that section 1334(d) *divests* other courts of jurisdiction previously acquired over the debtor's property.[19]

In accordance with section 1334(d) and *Isaacs*, the filing of MCorp's petition divested the Board of the jurisdiction to continue to prosecute its administrative proceedings or to initiate any new proceedings to force MCorp to downstream assets to the MBanks or the receivership estates of the Closed MBanks. Such proceedings constitute a blatant attempt to control MCorp's assets and interfere with the district court's exclusive jurisdiction over estate assets. It would be incongruous to interpret section 1334 as vesting the bankruptcy court with jurisdiction, while simultaneously interpreting the exhaustion provisions of section 1818(i) as divesting the bankruptcy court's jurisdiction in favor of an administrative agency, particularly in light of the Board's apparent concession that the bankruptcy court would regain jurisdiction immediately upon the conclusion of the administrative proceeding. Board Br. 20.

In effect conceding the district court's exclusive jurisdiction over MCorp's property, the Board attempts to sidestep that jurisdiction by recharacterizing its proceedings as seeking only "to ascertain whether MCorp has violated the law or committed unsafe or unsound banking practices" and as having only "speculative" "tangential effects" on the district court's exclusive jurisdiction. Board Br. 27-28. Such assertions are, however, wholly illusory. It is plain from the face of the temporary cease-

[19] *See In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir. 1985); *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985).

and-desist orders and the notices of charges that the Board seeks to compel the payment of money by MCorp. Indeed, contrary to the Board's assertion concerning the purported "absence of legally binding agency action," Board Br. 18, the outstanding temporary cease-and-desist orders exercised immediately effective control[20] over the assets of the bankruptcy estate by barring or limiting MCorp's use of its own funds, J.A. 66, 69, and by mandating the payment of money by MCorp, J.A. 85, 192-93. Similarly, the pending administrative proceedings seek to compel MCorp to cease and desist immediately from its alleged violation of section 23A (allegedly obtaining an unsecured extension of credit by failing to make contractually required payments to the two Closed MBanks) and the Board's "source-of-strength" policy. J.A. 89-91. To "cease and desist" from these alleged violations, MCorp would have to repay the alleged extension of credit and make the demanded capital infusions by disbursing its assets as directed by the Board.

Significantly, however, failure to comply immediately with a temporary or permanent cease-and-desist order subjects the respondent to substantial daily accruing civil money penalties. 12 U.S.C. § 1818(i)(2). Congress intended such penalties as a strong deterrent to noncompliance and to give temporary and permanent cease-and-desist orders "a self-enforcing effect."[21] Indeed, in

[20] Temporary cease-and desist orders remain in force until the issuance and effectiveness of a permanent cease-and-desist order or the dismissal of the notice of charges. 12 U.S.C. § 1818(c)(1).

[21] *Financial Institutions Supervisory Act Amendments of 1977: Report of the Senate Comm. on Banking, Housing and Urban Affairs*, S. Rep. No. 323, 95th Cong., 1st Sess. 9 (1977); *accord The Safe Banking Act of 1977: Hearings Before House Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 2863 (1977) (statement of Robert F. Keller, Deputy Comptroller General); *Abercrombie* v. *Clarke*, 920 F.2d 1351, 1359 (7th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3743 (U.S. Apr. 22, 1991) (No. 90-1626) (*Cease-and-desist orders "are meant to have a 'self-enforcing' effect on the banking community. . . .* The banker under a cease and desist order operates with the knowledge

authorizing the use of these massive sanctions, Congress intended to eliminate the need to prosecute a separate federal district court enforcement action to secure immediate compliance with an outstanding temporary or permanent cease-and-desist order.[22] This Court previously has noted the "self-enforcing" nature of administrative orders that are—like the Board's cease-and-desist orders—subject to the assessment of civil penalties from the date of effectiveness.[23]

B. 28 U.S.C. § 1334(b) Brings All Bankruptcy-Related Matters Within the Jurisdiction of the District Court and Is Not Displaced by 12 U.S.C. § 1818(i)

In addition to granting exclusive jurisdiction over a debtor's property, section 1334 grants the district court, sitting as a bankruptcy court, original jurisdiction of *all proceedings* "arising in or related to cases under [the Bankruptcy Code], . . . [*n*]*otwithstanding any Act of Congress that confers exclusive jurisdiction on* [*any other*] *court.*" 28 U.S.C. § 1334(b) (emphasis added).[24] The legislative history explains that this provision, which was at the heart of the sweeping changes in the jurisdiction granted to bankruptcy courts under the Bankruptcy Reform Act of 1978,[25] grants district courts "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases" to protect a debtor from, among other things, bifurcated and duplicative litigation in multiple forums. House Report at 48-49. Thus, section 1334 is part of the comprehensive statutory scheme to protect both debtors and creditors of which sections 105 and 362 are integral parts.

Continued prosecution of the Board's administrative proceeding would frustrate the purposes underlying section 1334(b) and the Bankruptcy Code. Even if the Board's proceedings were as narrow as the Board seeks to portray them, the proceedings fundamentally involve the determination of prepetition claims against a debtor under the Bankruptcy Code. Such matters routinely are heard and finally determined by the bankruptcy courts. Indeed, the section 23A proceeding, which essentially involves a "garden variety" commercial dispute over a prepetition transaction, is the subject of a pending proceeding in the district court, sitting in bankruptcy, upon MCorp's objection to the FDIC's proof of claim. If the Board is permitted to proceed with its section 23A proceeding, MCorp will be required to litigate the issues concerning the very same transaction twice—once before the district court and a second time before the Board—with the concomitant possibility that the two tribunals may reach contradictory determinations.

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that *any deviation from that order*—purposeful or otherwise—*will result in a significant penalty*—whether the authorities discover the violation immediately or later.") (emphasis added).

[22] *See Bank Supervision, Bank Directors, and Conflicts of Interest, Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 38-39 (1977) (statement of Stephen S. Gardner, Vice-Chairman, Federal Reserve Board); 104-05 (statement of Daniel J. Goldberg, Acting General Counsel, Federal Home Loan Bank Board) ("Under the present statutory scheme, an association subject to such an order "gets two bites at the apple" before it may be required to comply with the order. . . . Agency authority to impose a meaningful civil penalty for violation of the final orders . . . would *eliminate Federal court action on matters which could more appropriately and effectively be handled at the administrative level.*") (emphasis added).

[23] *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 592 (1966). In addition, willful failure to comply with a cease-and-desist order issued under the BHC Act—such as the orders at issue here—could subject the holding company and its officers and directors to criminal sanctions. 12 U.S.C. § 1847. Moreover, failure to comply with a cease-and-desist order could subject the officers and directors of a bank holding company to immediate removal. 12 U.S.C. § 1818(e).

[24] Significantly, 12 U.S.C. § 1818(i) does not provide for superseding any Act of Congress that also provides exclusive jurisdiction for a court.

[25] The original jurisdictional provisions added by the Bankruptcy Reform Act were codified at 28 U.S.C. § 1471 (repealed). The Bankruptcy Amendments and Federal Judgeship Act of 1984 repealed section 1471, but incorporated the relevant provisions thereof, without changes which are material hereto, in 28 U.S.C. § 1334.

Ignoring the specific language and unambiguous legislative intent under section 1334(b), the Board relies on cases construing section 1818(i) which do not involve an overriding, statutory grant of exclusive or primary jurisdiction to another tribunal.[26] Courts which have confronted the issue here—the interplay between bankruptcy court jurisdiction and other federal statutes conferring exclusive jurisdiction on another tribunal—have consistently held that the phrase "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on [any other] court" is expressly intended to confer on the bankruptcy courts jurisdiction over all matters related to the debtor's chapter 11 case.[27]

Accordingly, the Board's reliance on section 1818(i) to divest the district court of jurisdiction to enjoin the Board's proceedings pursuant to section 105(a) is misplaced. Congress clearly has provided that statutes, such as section 1818, which according to the Board, vests the courts of appeals with "exclusive jurisdiction" to review the Board's cease-and-desist orders, Board Br. 32, do not bar the bankruptcy courts from exercising jurisdiction over proceedings related to a bankruptcy case. Indeed, the Board concedes that section 1334(b) "effectively superseded" jurisdictional exclusivity statutes "that otherwise would have deprived the district courts of jurisdiction." *See* Board Br. 26. To avoid the clear implication of section 1334(b), the Board argues, and the court of appeals ruled, that section 1334(b) does not apply to "civil proceedings" pending before an administrative agency or in an Article I court.

[26] *See* Board Br. 20-21 (citing *Eastern Nat'l Bank* v. *Conover*, 786 F.2d 192 (3d Cir. 1986); *Investment Co. Inst.* v. *FDIC*, 728 F.2d 518 (D.C. Cir. 1984); *Groos Nat'l Bank* v. *Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978); *First Nat'l Bank* v. *United States*, 530 F. Supp. 162 (D.D.C. 1982)).

[27] *See, e.g., In re Casey Corp.*, 46 Bankr. 473 (S.D. Ind. 1985); *In re Shelby County Healthcare Serve. of Ala., Inc.*, 80 Bankr. 555 (Bankr. N.D. Ga. 1987).

Such a theory—that section 1334(b) may grant the bankruptcy court concurrent jurisdiction over proceedings pending before another court but not over an administrative proceeding—is faulty, illogical, and without precedent. This argument conflicts with both the plain terms of section 1334(b), which gives the district court sitting in bankruptcy jurisdiction over "all civil proceedings," including administrative proceedings, and with the purposes of the broad grant of jurisdiction conveyed on the district courts by the Bankruptcy Code. Indeed, as the court of appeals acknowledged, J.A. 19, such a theory contradicts *In re Casey Corp.* and *In re Shelby County Healthcare Services of Alabama, Inc.*,[28] the only other cases that have considered the issue.

C. Statutory Construction of Sections 1334 and 1818(i) Demonstrates That If They Are Incompatible, Section 1334 Preempts Section 1818(i)

The Board's resort to a simplistic application of hornbook rules of statutory construction to support its position that section 1818(i) divests the district court of jurisdiction is entirely without merit.[29] As the cases cited by the Board demonstrate, these rules apply only "[w]here there is no *clear* intention otherwise." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (citations omitted). In enacting section 1334, Congress has expressed its clear intent to extend the bankruptcy courts' jurisdiction to all matters "relating to" chapter 11 cases, "notwithstanding any other Act of Congress to the con-

[28] 46 Bankr. 473 (S.D. Ind. 1985); 80 Bankr. 555 (Bankr. N.D. Ga. 1987).

[29] The Board's resort to the maxim that a "specific" statute governs a "general" statute is, under the circumstances of the instant case, patently absurd. Contrary to the Board's assertions, the provisions of section 1334 are no less narrow, precise and specific than the provisions of section 1818. *See Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (where the Court, in declining to read two statutes as being in irreconcilable conflict, stated "[w]e must read [both] statutes to give effect to each if we can do so while preserving their sense and purpose.").

trary"—a congressional mandate as specific and significant as that of section 1818(i).[30]

Finally, the tax anti-injunction provision of the Internal Revenue Code, 26 U.S.C. § 7421(a), which has been held to have been overridden by the Bankruptcy Code, makes it all the more clear that the exhaustion of administrative remedies policy underlying section 1818(i) does not supersede the broad authority of the district court in bankruptcy. In *Bostwick* v. *United States*, 521 F.2d 741 (8th Cir. 1975), the debtor filed a motion to determine whether taxes owed the federal government were discharged by the bankruptcy court's order of discharge. Thereafter, the debtors moved to enjoin the government from collecting back taxes until the bankruptcy court could determine the motion. The government argued that the tax anti-injunction statute prohibited the bankruptcy court from entertaining the injunctive action. The Eighth Circuit held that the Bankruptcy Code overrides the tax anti-injunction statute:

> However, we do not believe that the "anti-injunction statute" is relevant to the present case inasmuch as Congress has evidenced an intention to enact a complete scheme governing bankruptcy which overrides the general policy represented by the "anti-injunction" act.
>
> * * * *
>
> *We believe that the overriding policy of the Bankruptcy Act is the rehabilitation of the debtor and we are convinced that the Bankruptcy Court must have the power to enjoin the assessment and/or collection of taxes in order to protect its jurisdiction, administer the bankrupt's estate in an orderly and efficient manner, and fulfill the ultimate policy of the Bankruptcy Act.*

521 F.2d at 744 (emphasis added).[31]

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[30] Significantly, unlike section 1334, section 1818(i) reflects no similar intent to override conflicting federal statutes.

[31] The Board's reliance below on *In re Becker's Motor Transportation, Inc.*, 632 F.2d 242 (3d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), is misplaced. *See* Board Br. (5th Cir. Aug. 14, 1989) 23. Although the court in *Becker's Motor* reached a different result from *Bostwick*, it never addressed the fundamental policy issue decided in *Bostwick*—which statute should govern. Rather, the *Becker's Motor* court focused on the fact that Congress added exceptions to the tax anti-injunction statute only four months after conferring on bankruptcy courts the power to adjudicate tax claims and concluded that, in those circumstances, reading the Bankruptcy Act to override the tax anti-injunction statute would contravene congressional intent. 632 F.2d at 246. As discussed above, such statutory construction arguments do not apply to section 1818(i) and, in fact, contradict the Board's own position.

III. THE COURT BELOW HAD JURISDICTION TO RULE ON THE INVALIDITY OF THE BOARD'S SOURCE-OF-STRENGTH ASSESSMENT POLICY AS PART OF MCORP'S CHALLENGE TO THE TEMPORARY CEASE-AND-DESIST ORDERS

Regardless of whether section 1334(b) grants the district court jurisdiction to stay the Board's pending administrative actions, the court below had jurisdiction to rule on the merits of the Board's source-of-strength assessment policy by virtue of MCorp's pending challenge to the temporary cease-and-desist orders in the District Court for the Northern District of Texas. J.A. 174. The Board concedes that 12 U.S.C. § 1818(i) does not restrict the district court's "jurisdiction to issue an injunction . . . [against] a *temporary* cease-and-desist order" prior to the completion of the administrative proceedings. Board Br. 20. Indeed, such authority is expressly granted by 12 U.S.C. § 1818(c)(2). The Board also concedes that section 1334(b) grants the district court sitting in bankruptcy concurrent jurisdiction over pending cases "previously committed to the exclusive jurisdiction of another *judicial* forum" by a statute such as section 1818. *Id.* at 26.

Under section 1334(b), as the Board apparently concedes, *see* Board Br. 26, the district court, sitting in bankruptcy, can exercise its original concurrent jurisdiction over the pending civil action in the Northern District of Texas. Based upon the district court's prelim-

inary injunction enjoining the three temporary cease-and-desist orders and its power under 1334(b), the court of appeals had jurisdiction to rule on the validity of those temporary orders, including the question of the Board's statutory authority to exercise its alleged source-of-strength assessment authority in those orders.

IV. THE BOARD'S PROPOSED SOURCE-OF-STRENGTH ASSESSMENT AUTHORITY IS WHOLLY WITHOUT STATUTORY SUPPORT

In any event, because the Board has no statutory authority to bring a source-of-strength assessment proceeding, the Board cannot lawfully proceed with its source-of-strength assessment action, and the district court properly enjoined that proceeding and the related temporary cease-and-desist orders.

The Board concedes that it has no express statutory authority to assess bank holding companies for the losses of subsidiary banks, but argues that three statutes, when read together and considered as a whole, somehow impliedly grant it such authority.[32] According to the Board, nothing in these statutes "precludes the Board from determining . . . that bank holding companies, despite their legal status as separate corporate entities, must ultimately remain accountable for the capital adequacy of their subsidiary banks." Board Pet. 25.

This unprecedented statutory analysis turns the law upside down. Agency authority must be rooted in an affirmative statutory grant. *See Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361 (1986); *Wheeler* v. *Greene*, 280 U.S. 49 (1929). For an administrative agency to claim authority on the basis that statutes do not expressly preclude such authority is contrary to law and, in the circumstances here, directly contrary to congressional intent and the legislative history on the repeal of shareholder assessment authority.

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[32] The BHC Act, 12 U.S.C. § 1842(c), FISA, 12 U.S.C. § 1818, and ILSA, 12 U.S.C. § 3901 *et seq.*; *see* Board Br. 18, 36.

A. Congress Banned Shareholder Assessments

Contrary to the Board's theory of congressional silence, Congress has spoken directly to the issue of shareholder assessment authority on a number of occasions. As noted by the FDIC, the Board's claimed authority to assess bank holding companies for losses of capital of subsidiary banks is inconsistent with the repeal by Congress of the shareholder assessment powers previously authorized under the National Bank Act.[33]

As originally enacted in 1864, the National Bank Act imposed double liability on shareholders of national banks.[34] In a series of four amendments to the National Bank Act, adopted in 1933, 1935, 1953 and 1959, Congress repealed these shareholder assessment provisions and completely eliminated the assessability of national bank stock.[35] These amendments embody the "manifest purpose and intention on the part of the Congress to do

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[33] *See* FDIC, *Mandate for Change: Restructuring the Banking Industry* 94 (Oct. 1987). All of MCorp's current and former subsidiary banks involved in the Board's action are (or were prior to their seizure) national banks.

[34] Act of June 3, 1864, ch. 106, 13 Stat. 99 (formerly codified at 12 U.S.C. § 63). National bank shareholders were individually responsible for all "contracts, debts, and engagements" of the national bank "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." *See also* Federal Reserve Act, Pub. L. No. 63-43, § 23, 38 Stat. 273 (1913) (formerly codified at 12 U.S.C. § 64).

[35] 12 U.S.C. § 64a; Banking Act of 1933, Pub. L. No. 73-66, § 22, 48 Stat. 162, 187 (1933); Banking Act of 1935, Pub. L. No. 74-305, § 304, 49 Stat. 684, 708 (1935); Act of May 18, 1953, Pub. L. No. 83-28, 67 Stat. 27 (1953); Act of Sept. 8, 1959, Pub. L. No. 86-230, § 7, 73 Stat. 457 (1959). Over the same period, most of the states similarly repealed shareholder assessment provisions applicable to state-chartered banks. *Anderson* v. *Abbott*, 321 U.S. 349, 381 n.8 (1944) (Jackson, J., dissenting). Similarly, the FDI Act was amended to require the FDIC, acting as receiver, to waive shareholder assessments. 12 U.S.C. § 1821(g)(3); S. Rep. No. 1651, 75th Cong., 3d Sess. (1938); H.R. Rep. No. 1297, 75th Cong., 1st Sess. (1937); *see generally* Vincens, *On the Demise of Double Liability of Bank Shareholders*, 12 Bus. Law. 275 (1957).

away with the so-called 'stockholders' double liability' *and to ultimately abandon the same as a policy in the regulation of the banking business.*"[36] In adopting these amendments, Congress was quite aware that bank holding companies owned national banks, and yet chose not to retain or impose any statutory provisions permitting assessment of national bank shares held by holding companies.[37] The last of the four amendments prohibiting assessment of national bank stock was enacted three years after the BHC Act.[38] Notably, section 19 of the Banking Act of 1933, which contained the initial provisions for Board regulation of bank holding companies, required a holding company to establish a special fund of liquid assets to satisfy assessments on national bank stock issued prior to 1933, which remained subject to assessment, and on the stock of those state-chartered banks for which assessability had not yet been repealed.[39] Ultimately—after the enactment of legislation eliminat-

[36] *FDIC* v. *Heinrich*, 26 F. Supp. 293, 294 (D.S.D.), *aff'd*, 106 F.2d 633 (8th Cir. 1939) (emphasis added); *accord* H.R. Rep. No. 259, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S. Code Cong. & Admin. News 1642 ("It is the opinion of [the House banking] committee that the double liability feature on national bank stock should be once and for all terminated.").

[37] *See* Banking Act of 1933, Pub. L. No. 73-66, § 19, 48 Stat. 162 (first federal statutory provisions governing bank holding companies), § 22 (providing that shares issued after adoption of Act were not assessable); Banking Act of 1935, Pub. L. No. 74-305, § 311, 49 Stat. 684 (regulating bank holding company voting stock of its subsidiary banks), § 304 (providing that shares of national bank not assessable after publication of notice); *Anderson* v. *Abbott*, 321 U.S. at 375-79 (Jackson, J., in dissent to decision involving a pre-1933 assessment of national bank shares that was passed through as an assessment on shareholders of the bank's holding company, noted that Banking Act of 1933 both repealed assessability of national bank stock and provided for regulation of bank holding companies, but did not retain or create special assessment provisions applicable to bank holding companies).

[38] Act of Sept. 8, 1959, Pub. L. No. 86-230, § 7, 73 Stat. 457.

[39] Banking Act of 1933, Pub. L. No. 73-66, § 19(b)-(c), 48 Stat. 162 (formerly codified at 12 U.S.C. § 61).

ing all shareholder assessments—this liquid asset fund requirement was repealed as obsolete by the Bank Holding Company Act Amendments of 1966.[40]

Congress was keenly aware that, by eliminating the assessability of national bank stock, it was permitting shareholders to choose not to support a troubled bank.[41] Congress also was aware of the safety and soundness factor raised by eliminating stock assessability.[42] Congress, however, chose to address the safety and soundness issue by other means, such as by increasing the amount of surplus capital required to be retained by national banks.[43]

[40] Bank Holding Company Act Amendments of 1966, Pub. L. No. 485, § 13(c), 80 Stat. 242; S. Rep. No. 1179, 89th Cong., 2d Sess. 12 (1966). The same Congress that repealed this requirement as obsolete enacted FISA, one of the principal purported statutory underpinnings of the Board's source-of-strength assessment policy.

[41] The Board argues that the repeal of shareholder assessments "[d]oes [n]ot [u]ndermine" the Board's source-of-strength regulation because such shareholder assessments, "in stark contrast" to source-of-strength assessments, were not intended to serve the remedial purpose of preventing bank failures, Board Br. 44-45. The fallacy of this argument is demonstrated by Comptroller O'Connor's 1935 testimony concerning the remedial purpose of shareholder assessments:

> Now, let me make that very particular: Here is a bank that has an impairment of its capital, and the Comptroller says, "You have got to repair that capital and put up $100,000, or $1,000,000", and if there is no double liability, those directors and shareholders are not as interested in repairing that capital and working out the problems of that bank as if there was no double liability, because they are just apt to say, "Take it; its yours", and walk out of the picture.

Banking Act of 1935: Hearings Before House Comm. on Banking and Currency on H.R. 5357, 74th Cong., 1st Sess. 153 (testimony of Comptroller of the Currency O'Connor) ("1935 Hearings").

[42] "We must at once appreciate the fact that, by eliminating double liability on all national banks, we have tremendously weakened the banking structure of the nation." 1935 Hearings at 147 (testimony of Comptroller of the Currency O'Connor).

[43] Banking Act of 1935, §§ 309, 315 (codified at 12 U.S.C. §§ 51, 60).

These amendments to the National Bank Act were motivated in large part by the determination of Congress that the *total elimination* of monetary assessments against national bank shareholders was necessary to attract new capital to rebuild the banking system.[44] Consistent with this history, the FDIC has stated:

> [T]he "source-of-strength" doctrine does raise several questions. If this type of authority were asserted and proved to be enforceable, it would make investment in bank equities relatively unattractive: if the downside potential of an investment exceeds the initial commitment, investors will demand a higher expected return to compensate for the additional risk. It should be remembered that many bank stocks prior to the mid-1930s were subject to additional assessments if the bank experienced financial difficulties. This requirement was removed because of its negative effect on the ability of banks to raise new capital.[45]

As recently as September 25, 1990, Chairman Seidman of the FDIC testified before the House Banking Committee that "[t]he FDIC has concerns about expanding the cross-guarantee concept to require the nonbanking entities within an organization to support the organization's bank or banks." Chairman Seidman disputed the need for treating all units within a holding company as if they were parts of a "single corporate entity" and reiterated his agency's view that the implementation of a source-of-strength assessment power "would reduce market efficiency, restrain the ability of banks to be viable competitors in the financial marketplace, and limit the ability to obtain new capital for the banking industry." [46]

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[44] 1935 Hearings at 153 (testimony of Comptroller O'Connor).

[45] FDIC, *Mandate for Change: Restructuring the Banking Industry* 94 (Oct. 1987).

[46] *Deposit Insurance Reform: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 275, 324-25 (1990) (testimony of FDIC Chairman L. William Seidman,

The Board's arrogation of unlimited authority to levy monetary assessments on corporate shareholders of banks not only is inconsistent with the legal and policy position of the FDIC, but more fundamentally it is in direct contravention of the congressional repeal of shareholder assessment authority.

B. Congress Has Considered and Rejected Proposals To Reinstate Shareholder Assessment Authority

On numerous recent occasions, Congress has considered various reformulations of the repealed bank shareholder assessment provisions, and it has consistently refused to enact any legislation that would provide the Board with source-of-strength assessment authority.

In 1987, Congress considered, but did not enact, legislation suggested by a House Committee Report that would have "implement[ed]" the Board's source-of-strength assessment policy by creating a new liability rule that would have made "the holding company, in effect, commit all its resources to back the deposits of each bank or thrift subsidiary." [47] Congress similarly considered, but did not enact, a more limited source-of-strength assessment authority contained in a bill introduced by Congressman Barnard in 1987 that would have granted the federal banking regulators power to order a holding company to choose between adding capital to an inadequately capitalized subsidiary bank or divesting that bank.[48]

Again, in 1988, Congress declined to grant the Board even a limited source-of-strength assessment power. That year, Senators Garn and Proxmire introduced S. 2715, which would have amended section 5 of the BHC Act to

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citing FDIC, *Mandate for Change: Restructuring the Banking Industry*).

[47] *Modernization of the Financial Services Industry: A Plan for Capital Mobility Within a Framework of Safe and Sound Banking*, H.R. Rep. No. 324, 100th Cong., 1st Sess. 48, 79-80 (1987).

[48] H.R. 3799, 100th Cong., 1st Sess., § 101(d), 133 Cong. Rec. H11,865 (daily ed. Dec. 18, 1987).

authorize the Board, at the request of the FDIC, to require a bank holding company and its nonbank subsidiaries to contribute or transfer to any failing bank within the holding company system "such assets or services as are customarily utilized by a bank in the conduct of its business or operations." [49] Board Chairman Greenspan acknowledged that the bill would "*establish*[] the principle that the financial strength of healthy segments of the system be used to bolster the capital or financial resources of a distressed banking affiliate" and suggested that the hearing on the bill "*could explore whether* provisions should ~~be~~ made to require the *nonbanking assets of the holding company* to be used to support an ailing bank affiliate." [50]

In enacting FIRREA in 1989, Congress again considered proposals advanced by the federal bank regulatory agencies on how to treat problem banks within a multibank holding company system. These proposals included the Board's *proposed* source-of-strength assessment authority, and the FDIC's alternative "cross-guaranty" proposal that all subsidiary banks within a holding company system (but not the holding company itself or its nonbank affiliates) should be subject to assessment for any loss incurred by the FDIC in disposing of any failed bank within the system. The proposals were summarized in a comprehensive FDIC report on the banking system [51] that the FDIC presented to each member of the House and Senate banking committees,[52] and that shaped con-

[49] S. 2715, 100th Cong., 2d Sess., § 2, 134 Cong. Rec. S11,441 (daily ed. Aug. 10, 1988).

[50] *Oversight on the Condition of the Financial Services Industry: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 100th Cong., 2d Sess. 488 (1988) (letter from Alan Greenspan, Chairman of Federal Reserve Board, to Sen. William Proxmire (June 29, 1988) (emphasis added)).

[51] FDIC, *Deposit Insurance for the Nineties, Meeting the Challenge* (Draft 1989) [hereinafter "FDIC 1989 Report to Congress"].

[52] *See Financial Condition of the Federal Savings and Loan Insurance Corporation and Federal Deposit Insurance Corporation at*

gressional debate on FIRREA.[53]

The FDIC urged Congress that its "cross-guaranty" proposal was "the best alternative" for dealing with the issues raised by "problem banks" within a holding company system and that the Board's "source-of-strength" proposal had "*significant drawbacks compared to the other alternatives.*" [54] The FDIC emphasized that a source-of-strength assessment policy, which would "represent[] a *significant expansion* of bank regulatory authority," [55] would impair the competitiveness of banks in the financial services industry and would discourage new investment in the banking sector. According to the FDIC, "[c]ross-bank guarantees also are preferable to source-of-strength because they better preserve the distinction between separate corporate entities within a holding company." [56]

Year End 1988: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess. 212 (1989) (statement of L. William Seidman, Chairman, FDIC); *Financial Institutions Reform, Recovery and Enforcement Act of 1989 (H.R. 1278): Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 147 (1989) ("House FIRREA Hearings").

[53] While Congress was considering FIRREA, Congressman Barnard introduced a bill similar to his proposed 1987 legislation, that included a limited source-of-strength assessment power, under which a holding company would have had to choose between agreeing to add capital to an inadequately capitalized subsidiary bank or divesting control of that bank. H.R. 1992, 101st Cong., 1st Sess. § 101(d), 135 Cong. Rec. H1232 (daily ed. Apr. 13, 1989).

[54] FDIC 1989 Report to Congress at 233 (emphasis added).

[55] FDIC 1989 Report to Congress at 229, 231 (emphasis added).

[56] *Id.* at 231. The FDIC maintained that by obliterating "the distinctions between the separate corporate entities within a holding company system," and placing a bank holding company's nonbank as well as bank assets at risk when a bank subsidiary fails, the Board's "source-of-strength" proposal would impede bank holding company expansion into nonbanking areas, inhibit nonbanking firm

Congress agreed with and adopted the FDIC's cross-guaranty proposal, which is now codified in section 5(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1815(e). Congress did not, however, enact the Barnard bill or the Board's source-of-strength proposal or any other provision granting source-of-strength assessment authority to the Board.[57]

Congress again had the source-of-strength assessment issue before it in considering the Crime Control Act of 1990, Pub. L. No. 101-647 (Nov. 29, 1990). On May 17, 1990, two days after the court of appeals decided the *MCorp* case, the Senate Banking Committee heard testimony on the Board's source-of-strength assessment policy and the *MCorp* decision, as well as the practice of the OTS of obtaining net worth maintenance agreements from holding companies as a condition of their acquisition of a savings and loan association.[58] As adopted, Title XXVII

entry into the banking industry, reduce market efficiency, and lead to unwarranted expansion of regulatory authority. *Id.* at 229-30.

[57] The General Accounting Office has noted that section 206(e) of FIRREA "holds affiliated insured depository institutions liable for each other's losses *but does not extend this liability to holding companies unless they themselves are depository institutions.*" General Accounting Office, *Bank Powers: Report to the Chairman, Subcomm. on General Oversight and Investigations, House Comm. on Banking, Finance and Urban Affairs* at 13 n.7 (Mar. 1990) (emphasis added).

[58] *Deposit Insurance Reform and Financial Modernization: Hearings Before Senate Comm. on Banking, Housing, and Urban Affairs*, No. 973, Vol. II, 101st Cong., 2d Sess. 236-45 (May 17, 1990) (statement of Lawrence Connell), *quoted in* 136 Cong. Rec. S13,825 (daily ed. Sept. 25, 1990).

The court of appeals in *MCorp* expressly noted this practice and suggested that the Board, therefore, was not without an adequate alternative to its invalid source-of-strength assessment policy. The court observed that, "[a]s a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial soundness." J.A. 31-32 n.5. Although the Board complains that this statement offers it "little solace," Board Br. 42 n.25, the fact is that the Board has long recognized and used its application "condition-

of the Crime Control Act[59] notably failed to grant the Board or the FDIC authority to make involuntary source-of-strength assessments against holding companies.[60]

The question of a source-of-strength assessment authority is again before Congress in at least four pending bills:

(1) Section 101(d) of H.R. 192, introduced by Congressman Barnard on January 3, 1991, would grant the federal banking agencies authority to require a holding company to "contribute to the surplus capital of the insured depository institution, an amount necessary to bring the insured depository institution into compliance with the applicable minimum required capital adequacy."

(2) Title VI of H.R. 6, entitled "Source of Strength," introduced on January 3, 1991 by House Banking Committee Chairman Gonzalez, would vest the FDIC with source-of-strength assessment authority by expanding the cross-guaranty provisions of the Federal Deposit Insurance Act to assess bank holding companies and their non-

ing" authority to extract such agreements. *Board, Bank Holding Company Supervision Manual* § 204.0 (1982). The Board, however, did *not* condition the approval of the formation of MCorp on such a capital maintenance commitment, *see Mercantile Texas Corp.*, 70 Fed. Res. Bull. 595 (1984).

[59] The Crime Control Act enhances the enforceability of capital maintenance commitments (of the sort discussed in footnote 5 of the court of appeals' decision) in bankruptcy proceedings by providing, among other things, for their nondischarge in bankruptcy. Crime Control Act, § 2722, 104 Stat. 4789, 136 Cong. Rec. S18,323 (daily ed. Nov. 2, 1990). Significantly, Congress failed to provide for the enforceability in bankruptcy proceedings of the purported source-of-strength obligations of bank holding companies.

[60] Congress also declined to enact legislation introduced by Senate Banking Committee Chairman Riegle that would have granted the FDIC, but not the Board, a limited source-of-strength assessment authority by extending the FDIC's cross-guaranty assessment power to reach the assets of a holding company and other nonbank affiliates of a bank up to a maximum of five percent of the bank's assets. S. 3103, 100th Cong., 2d Sess. § 10, 136 Cong. Rec. S13,831 (daily ed. Sept. 25, 1990).

bank subsidiaries for losses incurred by the FDIC in the insolvency of an affiliated bank. Significantly, the bill would not vest any comparable assessment authority in the Board.

(3) Chairman Riegle on March 5, 1991 introduced S. 543, which would expose a bank holding company to liability for losses incurred by the FDIC in resolving the insolvency of an affiliated bank, would limit the liability of a bank holding company to a maximum of five percent of the total assets of the insolvent insured depository institution, would operate only prospectively, and would confer no authority on the Board.

(4) The Administration also has proposed a *limited* source-of-strength assessment power in connection with its program for modernizing the financial services industry. The Administration bill [61] provides, *inter alia*, that, if the capital adequacy of an insured bank falls below certain levels, its holding company would be required to restore the capital level of the bank, divest the bank, or terminate involvement in new financial activities.

It is indisputable, therefore, that Congress has repealed shareholder assessment authority, considered and rejected various proposals for reinstating shareholder assessment authority and is even now considering whether to reinstate any form of shareholder assessment authority. This extensive legislative history completely refutes the Board's claim of assessment authority. The Board apparently hopes that this Court will be more receptive to the Board's desire for source-of-strength assessment authority than Congress has been. But the authority is that of Congress—not this Court—to give.

[61] S. 713, 102d Cong., 1st Sess., 137 Cong. Rec. S3712 (daily ed. Mar. 20, 1991); H.R. 1505, 102d Cong., 1st Sess., 137 Cong. Rec. H1912 (daily ed. Mar. 20, 1991). Notably, none of these pending legislative proposals would authorize source-of-strength assessments against bank holding companies in bankruptcy.

C. The BHC Act Provides No Source-of-Strength Assessment Authority

In the face of the express repeal of shareholder assessments and repeated congressional rejection of numerous proposals to restore shareholder assessment authority, the Board purports to invoke an implied authority from three banking statutes. None of these Acts, singly or collectively, provides shareholder assessment authority.

The Board primarily relies on section 3 of the BHC Act. Section 3 directs the Board to consider the financial and managerial resources of a company at *the time the company seeks permission to acquire a bank.*[62] That is the only authority upheld in *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978). Neither that decision nor the BHC Act, however, contains any suggestion that the Board is authorized to assess a bank holding company for the losses of its subsidiary banks.

As the court of appeals observed, "*First Lincolnwood* is narrowly written and expressly limits the Board's authority to consider financial and managerial soundness of subsidiary banks to the Board's decision to grant or deny a holding company's application." J.A. 31. The court of appeals also noted that the BHC Act does not grant the Board authority to establish or enforce capital levels for, or otherwise regulate, banks owned by a bank holding company.[63] The court of appeals correctly rejected the Board's attempt to transform and expand its narrow statutory authority—to consider the financial soundness of a bank holding company in passing upon its applica-

[62] In fact, the Board "recognize[s] that Section 1842(c), by its terms, does not empower the Board to consider the holding company's continuing compliance with the terms and conditions of the acquisition." Board Br. 43.

[63] J.A. 31. The BHC Act does not grant the Board authority to regulate the activities of subsidiary banks of a bank holding company. *See Independent Ins. Agents of Am.* v. *Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 44 (1990).

tion to acquire a bank—into a broad authority to assess a bank holding company for the losses of its subsidiary banks, at any time, without limit and without any fault on the part of the holding company.[64]

The Board concedes that the alleged monetary assessment authority at issue here "extends the Supreme Court's holding, in . . . *First Lincolnwood Corp.*" [65] As noted by Justices Stevens' and Rehnquist's dissenting opinion, the Court in *First Lincolnwood* limited its holding concerning the Board's authority to deny applications to acquire a bank to a small subset of those applications in which the "effect" of the proposed "transaction would have been the formation of a financially unsound bank holding company." [66]

In 1984, when the Board amended its Regulation Y to provide that a "bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks," [67] the Board made no suggestion that it created an enforceable and unlimited obligation on the part of a bank holding company to downstream all its available assets into subsidiary banks.[68] Indeed, in the 1984 Regulation Y rulemaking proceeding, the Board received no substantive comments on this reiteration of its source-of-strength "concept." [69] Board Br. 6.

[64] In response to the *First Lincolnwood* decision, Congress *narrowed* the Board's authority to consider a holding company's strength by limiting the Board's power to disapprove the formation of one-bank holding companies. Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 221, § 713, 94 Stat. 190, 96th Cong., 2d Sess. (Mar. 31, 1980) (codified at 12 U.S.C. § 1842(c)) (limiting Board's power to disapprove, based upon loan on bank stock, application to form one-bank holding company).

[65] Board Suggestion for Rehearing *En Banc* (5th Cir.) at 7.

[66] 439 U.S. at 252 n.18, 258 n.6.

[67] 12 C.F.R. § 225.4; 49 Fed. Reg. 794, 820 (1984).

[68] *See* 49 Fed. Reg. 794 (1984); 48 Fed. Reg. 23,520 (1983).

[69] 49 Fed. Reg. 800 (1984).

In February 1987, in an administrative enforcement action brought against the Hawkeye Corporation,[70] the Board for the first time asserted that it could assess a bank holding company for the losses of its subsidiary banks. In April 1987, on the eve of the scheduled administrative hearing against Hawkeye, the Board dismissed its source-of-strength charges and concurrently issued a "Policy Statement" proclaiming its new "policy" that: [71]

> [A] bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity.[72]

The Board stated in its Policy Statement that a failure to provide capital to a troubled or failing subsidiary bank would be viewed as a violation of Regulation Y and an unsafe and unsound practice and that, "[w]here necessary, the Board is prepared to take supervisory action to require such assistance." [73]

[70] *In re Hawkeye Corp.*, No. 87-003-B-HC (Notice of Charges and Hearing Before the Board of Governors of the Federal Reserve System) (Feb. 5, 1987); Keeton, *Bank Holding Companies, Cross-Bank Guarantees and Source-of-Strength*, Fed. Res. Bank of Kansas City Econ. Rev. 54, 61 (May/June 1990).

[71] *See Fed Drops Case Against Hawkeye*, Am. Banker (May 4, 1987) at 11; 52 Fed. Reg. 15,707 (Apr. 30, 1987); Keeton, *supra* note 70, at 61.

[72] 52 Fed. Reg. 15,707 (1987).

[73] *Id.* at 15,708. The Board advises this Court that its Policy Statement is one of its (plural) "'source of strength' regulations," Board Pet. at I (Question Presented #2); Board Br. at I (Question Presented #3), 29, 31, a claim that the Board did not make below. As MCorp pointed out below, the Board is relying solely on the Policy Statement and "there is no statute or Board regulation which provides [source-of-strength assessment] authority." MCorp Br. 39 (5th Cir. Sept. 13, 1989); MCorp Reply Br. 32 (S.D. Tex. May 31, 1989). Contrary to the Board's new claim, the Policy Statement was *not* adopted pursuant to the notice-and-comment procedures of section 553 of the Administrative Procedure Act as required for "substantive rules." Therefore, it is not enforceable. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 313 (1979).

Not surprisingly, federal bank regulators other than the Board—the FDIC, the Resolution Trust Corporation (the "RTC"), and the OTS—take the position that language in the Savings and Loan Holding Company Act virtually identical to the BHC Act language relied on by the Board does *not* authorize source-of-strength assessments against savings and loan holding companies.[74] According to the FDIC, "[n]othing in the detailed regulations pertaining to savings and loan holding companies (or in any other statute or regulation) obligated a holding company to maintain the insured institution's net worth." [75] Similarly, the RTC acknowledges that:

> the absence of any statute or regulation expressly requiring savings and loan holding companies to maintain the solvency of the insured institutions under their control was precisely why the FHLBB/FSLIC used net worth maintenance agreements.[76]

The fact that the Board did not "discover" its purported source-of-strength assessment authority until 31 years after the BHC Act was adopted casts substantial doubt on the existence of any basis in the BHC Act for the alleged authority.[77]

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[74] *Compare* 12 U.S.C. § 1467a(e)(2) ("the Director [of OTS] shall take into consideration the financial and managerial resources and future prospects of the company and association involved") *with* 12 U.S.C. § 1842(c) ("the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned").

[75] Brief of Appellant FDIC at 29, *In re Conner Corp.*, No. 90-488 Civ-5-BO (E.D.N.C. Sept. 28, 1990) (footnote omitted) (copy lodged with Clerk of this Court).

[76] Brief of Appellant RTC at 22, in *Resolution Trust Corp.* v. *Savers*, No. 90-2037EA (8th Cir. Sept. 28, 1990). The enforcement staff of the OTS takes the same position. OTS Enforcement Review Committee Resolution No. 89-127 at 2, *In the Matter of Gary L. Akin, Sole Stockholder, Chairman and Former President of Texas-Banc Savings, F.S.B.* (Nov. 7, 1990). (Copies lodged with Clerk of this Court.)

[77] *Cf. BankAmerica Corp.* v. *United States*, 462 U.S. 122, 1?0 (1983).

D. ILSA Provides No Source-of-Strength Assessment Authority

The Board, citing Justice Stevens' dissenting opinion in *First Lincolnwood*, erroneously implies that ILSA granted it the power to prescribe minimum bank capital ratios "by a general rule or standard applicable to all banks." Board Br. 39 n.23. In fact, ILSA expressly withholds from the Board authority to establish and enforce capital levels for subsidiary banks of a bank holding company. While ILSA authorizes the appropriate federal bank regulatory agencies to establish minimum capital requirements for banks, that Act defines the Board as the appropriate federal banking agency *only* for "bank holding companies and any *nonbank* subsidiary thereof" (emphasis added),[78] thus denying the Board any authority over the capital of a bank.

Indeed, ILSA does not grant *any* agency authority to order a bank holding company to transfer its funds into subsidiary banks. In its 1984 rulemaking proposal implementing ILSA, the Board made no mention of any purported authority to require holding companies to contribute capital to subsidiary banks,[79] but rather acknowledged "that it serves no useful purpose to increase bank capital at the expense of its parent holding company." [80] Increasing bank capital at the expense of the holding company, however, is precisely what the Board is attempting to accomplish through prosecution of its source-of-strength assessment proceeding.

E. FISA Provides No Source-of-Strength Assessment Authority

The Board also relies on its cease-and-desist powers under FISA, 12 U.S.C. § 1818, to enjoin "unsafe and unsound" practices. However, no provisions of FISA authorize the Board to require a bank holding company

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[78] 12 U.S.C. § 3902(1)(A) (designating the Board as the "appropriate Federal banking agency" for "(A) bank holding companies and any *nonbank* subsidiary thereof" (emphasis added)).

[79] 49 Fed. Reg. 30,317 (1984).

[80] *Id.*

to downstream its own assets into a subsidiary bank, as the Board concedes. *See* Board Br. 37. In addition, "Congress never intended to give these agencies a 'blank check' authority" under the cease-and-desist provisions of section 1818.[81] Nothing in the history of the legislation on cease-and-desist authority with respect to bank holding companies remotely suggests that Congress intended to grant the Board power to assess holding companies for the losses of subsidiary banks. Instead, the legislation was adopted "to assure that financial institutions are not endangered with respect to activities engaged in by parent holding companies or for nonfinancial institution subsidiaries."[82] The Board's authority to "prevent or terminate" bank holding company activities that could cause harm to an affiliated bank, *id.*, provides no basis for the Board's claimed source-of-strength assessment authority to require a holding company to invest all its assets in its subsidiary banks. Moreover, if Congress intended the cease-and-desist provisions of section 1818 to authorize the Board or the other federal banking agencies to compel affiliates of a bank to inject capital into that bank, the enactment of section 206(e) of FIRREA, granting the FDIC express statutory authority to make "cross-guaranty" assessments against affiliated banks, would have been unnecessary because the FDIC and the Board already would have had such authority under FISA. The court of appeals correctly refused to permit the Board to use its general remedial powers to bootstrap its way into the substantive monetary assessment authority long denied it by Congress.

F. FIRREA Provides No Source-of-Strength Assessment Authority

The Board's claim of support from section 902 of FIRREA (amending 12 U.S.C. § 1818(b)) also is baseless. Section 902, which was enacted after the district court's decision, expressly relates to restitutionary-type remedies, *see* Board Br. 41, where an institution-affiliated party has acted in a "reckless manner" or "was unjustly enriched" at the expense of a financial institution. Section 902 has nothing whatsoever to do with the Board's alleged authority to make and enforce capital calls on bank holding companies, regardless of fault, for the losses of their subsidiary banks. The Board's alleged source-of-strength assessment authority is not limited to losses caused by the reckless conduct or involving the unjust enrichment necessary to invoke the restitutionary remedies of section 902. Instead, the Board's purported source-of-strength assessment authority turns solely upon the fact that a bank holding company owns a bank deficient in capital.

[81] *Larimore* v. *Comptroller of Currency*, 789 F.2d 1244, 1253 (7th Cir. 1986); *accord* S. Rep. No. 1482, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3532, 3538.

[82] S. Rep. No. 902, 93d Cong., 2d Sess. 10 (1974).

Notably, this Court refused to permit another federal agency to enforce bank shareholder assessments in the absence of express statutory authority, rejecting that agency's claim, similar to the Board's claim here, that it had implied authority to enforce such an assessment under its general statutory authority. *Wheeler* v. *Greene*, 280 U.S. 49 (1929). Noting that the Farm Loan Act did not expressly grant the Federal Farm Loan Board with a power to assess shareholders of joint stock land banks similar to that granted to the Comptroller over national bank shareholders, this Court stated:

> When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it is left to very attenuated implications what the model before it so clearly expressed.

280 U.S. at 51. This Court held that the general powers of the Federal Farm Loan Board to administer the Farm Loan Act were "inadequate to supply the omission of this power" to enforce shareholder assessment liability. 280 U.S. 52.

The Board's policy arguments in favor of a source-of-strength assessment power are not a substitute for the statutory authority denied it by Congress. Like any federal administrative agency, the Board possesses only the authority that Congress grants it by statute.[83] The Board may not unilaterally expand this authority based on its own interpretation of the "broad purposes" of the statutes it administers.[84] As this Court held in *Dimension Financial Corp.*, "[i]f the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address." 474 U.S. at 374.

V. THE BOARD'S SOURCE-OF-STRENGTH CHARGES WERE SUBJECT TO JUDICIAL REVIEW

A. 12 U.S.C. § 1818(i) Does Not Bar Review

As demonstrated above, the Board is utterly devoid of authority to levy monetary assessments against bank holding companies on the basis of its source-of-strength Policy Statement or on any other grounds. The Board nevertheless argues that 12 U.S.C. § 1818(i) barred the court of appeals from directing the district court to enjoin the Board's lawless source-of-strength assessment proceeding.

Section 1818(i) does not shelter the Board's *ultra vires* proceeding to enforce its invalid source-of-strength assessment policy. A statute, such as section 1818(i), that prescribes a general procedure for judicial review, does not

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[83] *See, e.g., Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989); *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986); *Wheeler* v. *Greene*, 280 U.S. 49 (1929); *American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U.S. 350 (1921); *Business Roundtable* v. *SEC*, 905 F.2d 406 (D.C. Cir. 1990); *Western Bancshares, Inc.* v. *Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

[84] *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. at 373-74.

bar a court's jurisdiction to enjoin an administrative proceeding that is beyond the authority of the administrative agency. *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958); *Manges* v. *Camp*, 474 F.2d 97 (5th Cir. 1973). Indeed, the Fourth Circuit has ruled that the holding in *Leedom* v. *Kyne* "*requires* that a federal court ascertain whether an administrative agency is acting within its authority. . . . ." *Champion Int'l Corp.* v. *EPA*, 850 F.2d 182, 186 (4th Cir. 1988) (emphasis added); *see also Dart* v. *United States*, 848 F.2d 217, 221 (D.C. Cir. 1988) ("Judicial review is favored when an agency is charged with acting beyond its authority."). In *Manges* v. *Camp*, 474 F.2d at 99, the Fifth Circuit specifically applied the *Leedom* v. *Kyne* doctrine to section 1818(i) and stated:

> There is . . . a very strong court created exception to withdrawal statutes. This exception comes into play when there has been a clear departure from statutory authority, and thereby exposes the offending agency to review of administrative action otherwise made unreviewable by statute.

Thus the court in *Manges* held that, under the doctrine of *Leedom* v. *Kyne*, section 1818(i) was inapplicable because the order at issue exceeded the Comptroller's statutory authority.[85]

Because the Board has no statutory authority to make a source-of-strength assessment against a bank holding company, there is no substance to the Board's contention that the court of appeals was constrained to await the completition of the Board's source-of-strength proceedings and the issuance of a final assessment order against

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[85] *See also Graham* v. *Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978) ("[I]f an administrative official clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdiction withdrawal statute is otherwise applicable."); *accord Mid America Bancorp.* v. *Board of Governors*, 523 F. Supp. 568, 574 (D. Minn. 1980) ("The language [of section 1818(i)] cannot be read literally, however. It must yield to an interpretation that permits a district court to enjoin Board actions that clearly exceed its statutory authority.").

MCorp before interdicting those proceedings. As the Fourth Circuit has confirmed:

> If an agency acts in clear derogation of its statutory authority, a court need not wait for the underlying proceedings to conclude to intervene, *Leedom* v. *Kyne*, 358 U.S. 184, 188 . . . (1958).

Gracey v. *Local 340 Int'l Bhd. of Elec. Workers*, 868 F.2d 671, 674 n.1 (4th Cir. 1989).

B. The Exhaustion Doctrine Is Inapplicable to Ultra Vires Proceeding

Conceding that section 1818(i) does not constitute a "jurisdictional bar," Board Br. 32, the Board invokes the doctrine of exhaustion of administrative remedies, *id.* at 35. As demonstrated by the preceding section, the Board has no statutory authority to adopt or enforce its source-of-strength assessment policy. The exhaustion doctrine is irrelevant to a proceeding beyond the authority of the agency. Moreover, requiring MCorp to exhaust its administrative remedies would advance none of the purposes served by the exhaustion doctrine. The compiling of a factual record, the proper framing of issues in dispute, permitting the agency to apply its expertise, and the efficient administration of justice are common rationales for the exhaustion requirement.[86] Such rationales do not apply here because, as the court of appeals noted, no facts are disputed, the issue is a purely legal one concerning the alleged statutory authority of the Board to levy monetary assessments against bank holding companies, the courts are expert in matters of statutory interpretation, and the prompt judicial resolution of the dispute eliminates unnecessary administrative proceedings and is in the interest of efficient judicial administration. J.A. 25-26. This Court, on a number of occasions, has ruled

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[86] *McKart* v. *United States*, 395 U.S. 185, 193-201 (1969); *Consumers Union of the United States, Inc.* v. *Cost of Living Council*, 491 F.2d 1396, 1399 (Temp. Emer. Ct. App.), *cert. denied*, 416 U.S. 984 (1974).

that exhaustion is not necessary when the dispute concerns a purely legal issue.[87]

C. 28 U.S.C. § 2106 Authorized the Court of Appeals To Direct the Entry of an Injunction Against the Board's Unlawful Source-of-Strength Proceeding

The independent grant of appellate jurisdiction in 28 U.S.C. § 2106 confirms the authority of the court of appeals to direct the entry of an injunction against the Board's source-of-strength assessment proceeding. App. 2a, *infra*. Appellate courts have invoked jurisdiction under section 2106 "in the interest of judicial economy." [88] *See Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968).

Had the court of appeals remanded to the Board, the inevitable consequence would have been the issuance of a source-of-strength assessment against MCorp followed by a challenge, *in the very same court of appeals*, to the legality of such a source-of-strength assessment order. This course would have produced only delay, a waste of judicial resources,[89] and unnecessary expenditure of funds of the debtor and the administrative agency.

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[87] *See, e.g., McKart*, 395 U.S. at 197-99; *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967); *see also Frontier Airlines, Inc.* v. *Civil Aeronautics Bd.*, 621 F.2d 369, 371 (10th Cir. 1980); *National Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F.2d 689, 695 (D.C. Cir. 1971); *Shell Oil Co.* v. *Federal Energy Admin.*, 400 F. Supp. 964, 968 (S.D. Tex.), *aff'd*, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975).

[88] *Government of the V.I.* v. *Smith*, 445 F.2d 1089, 1095 (3d Cir. 1971).

[89] *Grosso*, 390 U.S. at 71-72; *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967); *In re Hronek*, 563 F.2d 296, 298 (6th Cir. 1977); *Independent Bankers Ass'n of Am.* v. *Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

CONCLUSION

For the reasons stated herein, the court of appeals' instructions to the district court to enjoin the Board's *ultra vires* source-of-strength assessment proceeding were lawful and should be affirmed.

The court of appeals' ruling that the district court did not have jurisdiction and authority under the Bankruptcy Code to enjoin the Board from prosecuting its administrative enforcement actions is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 22 of the Banking Act of 1933, codified as amended at 12 U.S.C. § 64a:

> SEC. 22. The additional liability imposed upon shareholders in national banking associations by the provisions of section 5151 of the Revised Statutes, as amended, and section 23 of the Federal Reserve Act, as amended (U.S.C., title 12, secs. 63 and 64), shall not apply with respect to shares in any such association issued after the date of enactment of this Act.

Section 304 of the Banking Act of 1935, codified as amended at 12 U.S.C. § 64a:

> SEC. 304. Section 22 of the Banking Act of 1933, as amended, is amended by adding at the end thereof the following sentences: "Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: *Provided*, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or country, then in a newspaper of general circulation therein. If the association fail to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date six month subsequent to publication, in the manner above provided."

Section 2 of the Act of May 18, 1953, codified at 12 U.S.C. § 64a.

> SEC. 2. Section 22 of the Banking Act of 1933, as amended, is hereby amended by adding at the end

thereof the following sentence: "In the case of each association which has not caused notice of such prospective termination of liability to be published prior to the effective date of this amendment, the Comptroller of the Currency shall cause such notice to be published in the manner provided in this section, and on the date six months subsequent to such publication by the Comptroller of the Currency such additional liability shall cease."

Section 7 of the Act of Sept. 8, 1959:

SEC. 7. Section 5151 of the Revised Statutes (12 U.S.C. 63) and section 23 of the Federal Reserve Act (12 U.S.C. 64) are repealed.

28 U.S.C. § 2106:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.